

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON**

**BRADLEY COTTRELL, on behalf of the
ESTATE OF BERNARD DALE
COTTRELL,**

Plaintiff,

v.

**Civil Action No. 2:18-cv-01281
Honorable Thomas E. Johnston**

**NATHAN SCOTT STEPP, Individually as
a member of the West Virginia State
Police; ZACH W. HARTLEY, Individually
as a member of the West Virginia State
Police; OKEY S. STARSICK, Individually
as a member of the West Virginia State
Police; ROBERT B. HICKMAN,
Individually as a member of the Roane
County Sheriff's Department; ROANE
COUNTY SHERIFF'S DEPARTMENT;
and WEST VIRGINIA STATE POLICE,**

Defendants.

PROPOSED CONTENTS OF CERTIFICATION ORDER

COME NOW, the Parties, by and through their respective counsel, pursuant to the Court's Order of May 3, 2021 (Doc. 123) and West Virginia Code §51-1A-6, and provide the following proposed Certification Order:

§51-1A-6. Contents of certification order

(a) A Certification Order must Contain:

1. The question(s) of law to be answered:

- i. Does the West Virginia Supreme Court of Appeals recognize the United State Supreme Court's rule as established in *Graham* and *Lainer* which requires a constitutional claim that is covered by specific constitutional provision to be analyzed under the standard specific to that provision and not under substantive due process?
- ii. If the WVSCA answers the first question in the affirmative, considering the WVSCA's decision in *Fields*, would Art. III, Sec. 10 be considered redundant to Art. III, Sec. 6 where

Plaintiffs are clearly alleging excessive force claims but are no longer allowed to pursue Art. III, Sec. 6 as an avenue of relief?

2. The facts relevant to the question, showing fully the nature of the controversy out of which the question arose;

On September 6th, 2018, Plaintiff Bradley Cottrell, on behalf of the Estate of Bernard Dale Cottrell, filed his Complaint against Defendants Nathan Scott Stepp, both individually and in his official capacity as a member of the West Virginia State Police; Zach W. Hartley, both individually and in his official capacity as a member of the West Virginia State Police; Okey S. Starsick, both individually and in his official capacity as a member of the West Virginia State Police, Robert B. Hickman, both individually and in his official capacity as a member of the Roane County Sheriff's Department; the Roane County Sheriff's Department, and the West Virginia State Police. (ECF No. 1).

The suit follows an incident of September 6, 2016, which resulted in a fatal use of force by Defendants Stepp, Hartley and Hickman following a high-speed pursuit in Roane County, West Virginia, along Route 14. *Id.* at 21-22. It is not disputed that Defendants Stepp, Hartley and Hickman each discharged their firearms during the use of force. Bernard Dale Cottrell died as a result of the use of force. *Id.* at 3.

With regard to Defendants Stepp, Hartley and Hickman, Plaintiffs alleged causes of action based upon an alleged violation of the Fourth Amendment of the United States Constitution (*Id.* at 48), Art. III, Sec. 6 and 10 of the West Virginia Constitution (*Id.* at 77), as well as state law based claims of Battery and Negligence (*Id.* at Counts V and VI).

On March 12, 2019, the Court dismissed Plaintiff's claim pursuant to Article III, Section 10 of the West Virginia Constitution against Defendants Stepp and Hartley, holding that the protections afforded by that section were redundant of the protections against self-incrimination afforded by Article III, Section 6. (ECF No. 42 at 7.) In his Motion for Summary Judgment, Defendant Hickman asserted the same argument advanced by Defendants Stepp and Hartley, and previously accepted by the Court, with regard to the claims brought pursuant to Art. III, Sec. 10. ECF 79, at 15-16.

The Roane County Sheriff's Department was dismissed from this action by Order of March 12, 2019. *See ECF 42*. The West Virginia State Police was dismissed by the same Order. *Id.* The claims against Defendant Starsick do not contain any claims brought pursuant to the West Virginia Constitution.

3. A statement acknowledging that the receiving Court may reformulate the question.

The receiving Court may reformulate the questions.

4. The names and addresses of counsel of record and unrepresented parties.

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By Counsel,

/s/ John P. Fuller

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Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing “**Proposed Contents of Certification Order**” was served upon the following parties through the Court’s Electronic Case Filing (ECF) system on this day, Friday, May 14, 2021:

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